grammed months ago (see footnote 10 at Pet. 14). It would be curious, however, if either the New York counsel or the New York court did participate in such a scheme, alien as it is to the interests of the absentees and at a time when the issues of liability and damages which are the customary ingredients of a compromise are a matter of *res judicata* herein, and yet claim that they "fairly and adequately protect the interest of the class" as the Rule requires. Nevertheless, there is adequate time to obtain an appropriate stay order to permit the work of this Court to be concluded, if the integrity of the judicial system so requires.

The matter of national importance in these subsequent events, which commends the attention of this Court, is that these practices, whether by calculation or happenstance, stand as a mute subversion of the policies of Rule 23. The proposed New York compromise includes but a portion of the group Petitioners claim to represent, which means that the rights of one group (sellers similarly situated with Reynolds and Mitchell) are being sacrificed to obtain a settlement of questionable fairness even to the group it will benefit, or which at

---

requested, in a written document a copy of which was furnished to the court, that "lead counsel" designated by the New York court file appropriate papers opposing Respondents' motion. Because of the outstanding orders discussed at Pet. 7, counsel for Reynolds were disabled from filing any papers in their own right. Despite the request, "lead counsel" failed to oppose Respondents' motions and the announced "compromise" followed immediately.

[5] "[T]he Rule is designed to protect the class against surrender of class rights by a greedy or fainthearted plaintiff . . . ." Haudek, W., *The Settlement and Dismissal of Stockholders' Actions*, 22 Sw. L. J. 767, 776 (1968), citing Webster Eisenlohr v. Kalodner, 145 F. 2d 316, 320 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945); Marcus v. Textile Banking Co., 38 F.R.D. 185 (S.D.N.Y. 1965).

the very least will leave a substantial body of shareholders without any forum in which to present their claims. Whether the case be considered as arising under Rule 23(d) – which Judge Ritter plainly declared was the procedure he was following (App. 36a) – or under Rule 23(c) which Respondents urge that the Petition should have discussed even though its procedures were never invoked by the trial judge – is academic when one considers that *both* subdivisions require notice to the absentees of *every* matter which affects their vital interests. Moreover, Rule 23(e) requires that "notice of the proposed dismissal or compromise be given to all members of the class . . . ." Yet, the holders of approximately 325,000 shares have had their case dismissed, and have yet to receive any notice at all. The trial judge in class proceedings is intended to be the *guardian* of the absentees rights, not a mere arbiter in a game where the rights of the absentees are the pawns. *Norman* v. *McKee*, 290 F. Supp. 29, 32 (N.D. Cal. 1968); *Heddendorf* v. *Goldfine*, 169 F. Supp. 915, 926 (D. Mass. 1958).

Can it be fairly said that a system which produces seven years of delay – and then only the prospect of a substantial subversion of the absentees rights – is progressing in an orderly fashion, or, indeed, that such a system is functioning at all? Respondents do not claim that the seven years of delay were consumed in identifying the class members, nor could they make such a claim, for none of the multiple actions in New York which did not involve class allegations have proceeded with greater dispatch. Moreover, the *Reynolds* case had been tried and was pending on appeal before class action proceedings were ever invoked by the New York court. Had the delay been caused by the class proceedings the discretion the Rule vests in the trial judge was then ignored, for there is nothing in the Rule which prohibits proceeding with the trial of the common issue, as Reynolds has done, while the task of auditing

the brokers records[6] was in progress. The task, in short, is to devise a system which *will* work. The proceedings in New York show that in the context of this case it is not working, and it bears no promise of working unless a more enlightened approach to the class action is directed by this Court.

—E—

Respondents attempt to make light of the prefatory quotes contained in the Petition with their observation that they should not be considered because the Advisory Committee adopted its own philosophy. That argument simply taxes credibility, for the philosophy thus adopted *was* that of the prefatory quotes. Indeed, these citations were taken directly from the Committee notes.

Alternately, Respondents suggest that the Petition is "distorted and . . . unintelligible" because it fails to segregate "spurious," "hybrid," and "true" class actions, and relies instead upon the philosophical writings referred to in the Advisory Committee notes. These arguments are but expressive of the crises in judicial administration that this case represents, for nothing could be as plain as the Advisory Committee's declaration that this confusing and often misleading terminology was to be abandoned in favor of a practical concern for the rights of litigants. Thus, in this case there has been a substantial retreat from the policies the Advisory Committee sought to adopt and a return to many of the policies of the former rule which the Advisory Committee effected to discard. This Court should exercise its supervisory role to restore the intended meaning to the Rule.

---

[6] The task of auditing the brokers records is now completed. Petitioners do not propose to duplicate that work.

—F—

Respondents urging that the *Reynolds* case should not be extended to all persons similarly situated because a companion case involving a shareholder who sold prior to March 27, 1964 (the *Karlson* case discussed at Brief in Opposition, 10, 15, 23) was not urged by Petitioners to be a class action, simply ignores the obvious, for the holding in *Karlson* was given effect, *sub silentio* in *Astor v. Texas Gulf Sulphur Co.*, 306 F. Supp. 1933 (S.D.N.Y. 1969) when the cause of all persons similarly situated with *Karlson* was dismissed on Respondents' motion. Thus, it is Respondents rather than Petitioners who press for a one sided application of the Utah judgments.

—G—

Otherwise, Petitioners and Respondents have many obvious differences over the proper construction and application of the Revised Rule, and though Respondents are critical of our not discussing these elements in the Petition we submit that these are questions beyond the proper scope of a Petition and are appropriate only to the briefs on the merits. It is appropriate to observe, however, that Respondents repeated assertion that Rule 23 was "to prevent 'one way' [7] intervention" (Br. in Op. 20) is a calculated misreading of the Rule which ignores judicial precedent on the subject. The Advisory Committee notes say that *under subdivision (c)* one way interven-

[7] "One way intervention" describes the practice under the former Rule of converting individual actions into class actions after judgment was entered. The *Reynolds* case does not present a "one way intervention" problem, however, for *Reynolds* moved three times, in each instance before judgment, for appropriate orders under Rule 23. Thus, this case represents a review of allegedly erroneous rulings not within the scope of the "one way intervention" problem. See Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968) *cert. denied* 394 U.S. 928 (1969).

tion was to be eliminated, but that comment is not relevant to these proceedings because subdivision (c) was never invoked because of the errors by the lower courts. As we pointed out at pages 19-20 of the Petition, the Advisory Committee clearly declared that if there was a defect in notice, absentees might nevertheless participate in a favorable judgment obtained for their benefit, even though the jural relationship subdivision (c) contemplates was not created. Judge Weinstein read the revised Rule in that fashion in *Dolgow v. Anderson,* CCH FED. SEC. L. REP. ¶ 93,249 (E.D.N.Y. October 21, 1971), and the Court of Appeals reversed the dismissal of a class action in *Esplin v. Hirschi,* 402 F.2d 94 (10th Cir. 1968) *cert. denied* 394 U.S. 928 (1969), after the case had been decided on the merits. What Petitioners urge is less in the nature of "one way intervention" than the practices approved in both *Dolgow* and *Hirschi.* Respondents position would effectively mean that class action rulings are exempt from any appellate review, and would be in conflict with both *Dolgow* and *Hirschi.*

CONCLUSION

Even if the order of filing by the respective plaintiffs was a proper consideration, it must be observed that the Reynolds case is not in any sense a late "arrival." Respondents would speak more accurately if they said that Reynolds was a late starter, for he is not only an early "arrival' but he is the *only* arrival among all of the hundreds of plaintiffs Respondents make reference to. And, if one can start as far back in the pack as Respondents would have this Court believe that Reynolds did, and yet finish so far ahead in a game where the ultimate goal is efficiency, this Court should at least consider if the procedures invoked at the instance of Respondents in New

York are not a subversion of the judicial system, for there is nothing about the Reynolds case which should produce such a paradox.

Respectfully submitted,

PARKER M. NIELSON
320 Kearns Building
Salt Lake City, Utah 84101

Attorney for Petitioner Reynolds

ROY G. HASLAM
72 East 4th South Street
Salt Lake City, Utah 84111

Attorney for Petitioner Mitchell